



KANSAS

Bill Graves
Governor

OFFICE OF THE SECURITIES COMMISSIONER

David Brant
Commissioner

March 30, 2001

Rose Marie Frank
5001 West 100th Terrace
Overland Park KS 66207

RE: Request for Opinion No. 2001-007

Synopsis: A person who finds and evaluates potential investors, prepares marketing materials, and receives a "success fee" for completed transactions, must register as a broker-dealer under the Kansas Securities Act unless the person engages exclusively in transactions that are exempt from registration.

Dear Ms. Frank,

In your letter dated February 21, 2001, you requested our agency's confirmation that you may offer certain financial services without registering as an agent, broker-dealer, or investment adviser under the Kansas Securities Act. Unfortunately, our agency cannot give you the confirmation you desire. In our opinion, you cannot offer the services without registration as a broker-dealer, except as described below.

The facts contained in your letter are incorporated herein by reference. In summary, you state that you intend to "offer business owners of privately-held companies...a fee-based service to assist them in locating possible strategic buyers or investors." You intend to charge up-front fees, plus "success fees" for transactions with contacts you provide to the companies. However, you contend that you will not engage in the business of advising others concerning any transaction or advise any company on the merit of the opportunity. You also state that you will not participate in negotiating the terms of any investment or assist with the completion of any transaction.

According to your letter, you intend to provide the following services:

- Identifying potential buyers for the company and potential equity investors, such as venture capitalists, "private equity groups," and accredited investors.
- Assembling information on potential buyers and investors, and reviewing the information with the client.
- Sending a letter to the potential buyers and investors selected by the client. The letter will provide information about the company and will include a confidentiality agreement to be signed by the recipient.
- Preparing a "Confidential Information Memorandum" which describes the client's business, products and services, marketing plan, financial statements, etc.
- Determining which potential investors should receive the Confidential Information Memorandum.

Your letter says that you will provide no additional services after the Confidential Information Memorandum is sent to prospective investors. You will not be involved in future negotiations or discussions on behalf of the company.

Pursuant to Kan. Stat. Ann. 17-1252(c), a "broker-dealer" is any person engaged in the business of purchasing, offering, or selling securities for the account of others. In the opinion of staff for the Securities Commissioner, the activities you describe would put you in the business of offering or selling securities. Although you would not directly close the sales, your assistance in finding and evaluating potential investors, along with your preparation of the marketing materials, would be critical functions in the sales process. In addition, you would receive a "success fee" for finding people who actually invest in the company, so it is clear that your ultimate goal is selling securities.

Because your activities would bring you within the definition of a broker-dealer, you would be required to register under Kan. Stat. Ann. 17-1254 unless you deal *exclusively* in transactions that are exempt under Kan. Stat. Ann. 17-1262. In particular, you may be able to limit your activities to "isolated transactions" or sales to accredited investors, which are exempt under Kan. Stat. Ann. 17-1262 and are more fully described in Kan. Admin. Reg. 81-5-3 and 81-5-13, respectively. Please note that each exemption in Kan. Stat. Ann. 17-1262 or a corresponding regulation contains very specific standards, and the failure to carefully follow all of the requirements may disqualify you from an exemption. For example, your collection of a "success fee" would be construed as a commission, so you would be disqualified from various exemptions that do not allow the payment of commissions. In addition, the use of a general solicitation to market the investments would disqualify you from certain exemptions.

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In summary, you will need to register as a broker-dealer under the Kansas Securities Act unless you are very careful to deal only in exempt transactions. Because your proposed activities involve a complex area of the law, and the potential sanctions for unlawful conduct are severe, I encourage you to seek experienced legal counsel if you wish to pursue your proposed plan without registration.

The opinions expressed in this letter are based on facts as represented in your letter of February 21, 2001. This letter is intended solely as an expression of enforcement policy and is not binding on any court or other tribunal.

Sincerely,

A handwritten signature in black ink, appearing to read "Rick A. Fleming", with a stylized flourish at the end.

Rick A. Fleming
General Counsel